United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2629

IN THE

United States Court of Appeals

For the Second Circuit.

MYERS & MYERS, INC., LEROY MYERS, VIVIAN E. MYERS, and THOMAS L. MYERS,

Plaintiffs-Appellants,

v.

UNITED STATES POSTAL SERVICE, UNITED STATES POSTAL INSPECTION SERVICE, WILLIAM G. DELAMAR, Individually and as Contracting Officer for the United States Postal Service, WILLIAM E. PECK, Individually and as Contracting Officer of the United States Postal Service, and THE UNITED STATES OF AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

PLAINTIFFS-APPELLANTS' BRIEF AND APPENDIX.

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In the

United States Court of Appeals

For the Second Circuit.

Myers & Myers, Inc., LeRoy Myers, Vivian E. Myers, and Thomas L. Myers,

Plaintiffs-Appellants,

v.

United States Postal Service, United States Postal Inspection Service, William G. Delamar, Individually and as Contracting Officer for the United States Postal Service, William E. Peck, Individually and as Contracting Officer of the United States Postal Service, and The United States of America,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of New York.

PLAINTIFFS-APPELLANTS' BRIEF.

Preliminary Statement.

The order granting defendants' motion to dismiss was issued by Honorable Edmund Port, District Court Judge, Northern District of New York.

Issue Presented for Review.

Whether the plaintiffs have stated a cause of action subject to the District Court's jurisdiction.

Statement of the Case.

Plaintiffs commenced this action for damages pursuant to 28 U.S.C. Section 1346 and Chapter 171 of Title 28. The complaint was filed in the District Court for the Northern District of New York on April 1, 1974. On May 24, 1974, the attorneys for plaintiffs and defendants entered into a stipulation extending defendants' time to answer or otherwise respond to the complaint until July 31, 1974. On July 12, 1974, defendants served a notice of motion for an order to dismiss the action pursuant to Rule 12 of the Federal Rules of Civil Procedure. The motion was scheduled to be argued on September 9th. At that time, Honorable Edmund Port adjourned the motion to September 23, 1974. The motion was argued before Judge Port on September 23, and he granted the defendants' motion to dismiss the complaint. The order and final judgment dismissing the action was entered on October 2, 1974. The plaintiffs' notice of appeal from the order and final judgment was filed on November 4, 1974.

Statement of Facts.

This action is based on the defendants' failure to renew six star route contracts between plaintiff, Myers & Myers, Inc., and defendants. (The term "star route" is used by the United States Postal Service and its predecessor, the United States Post Office Department, to identify certain mail routes which were established primarily to transport mail by truck between post offices where train service is not available. Star route contractors are not government employees. The contractors work pursuant to contracts with the Postal Service. One provision in the star route contracts has always stated that the contractor is obligated to deliver the mail with "celerity, certainty and security." Over the years, three stars have been used to

represent those obligations of the contractors, and consequently they have come to be known as "star route" contractors.)

The plaintiffs have been star route contractors for over twenty-six years either as individuals, partners, or officers and employees of plaintiff, Myers & Myers, Inc., hereinafter referred to as Myers. Pursuant to a federal law enacted in June, 1948, plaintiffs have participated in negotiations with the United States Post Office Department during the twenty-six years, and the negotiations have resulted in the renewal of the star route contracts with the plaintiffs during that period of time. (The history and other details concerning the 1948 legislation are more fully explained in the argument portion of this brief.)

Between July, 1972 and May, 1973, Myers and the United States Postal Service (the successor to the United States Post Office Department) participated in negotiations for the renewal of Myers' six star route contracts which were to terminate on June 30, 1973. The negotiations for renewal had, in fact, been completed prior to May, 1973. (Plaintiffs' complaint, paragraphs "11" and "12".) Notwithstanding the completion of the negotiation procedures, the Postal Service, by letters dated May 16 and May 17, 1973, notified Myers that none of the six contracts would be renewed (Appendix, pp. 37-42). The letters did not state any reason for the decision not to renew. These letters meant that, as of June 30, 1973, Myers would no longer be in operation because the star route contracts constituted Myers' entire business.

Upon receipt of the letters, plaintiff LeRoy B. Myers contacted the Postal Service Contracting Officers who had issued the letters and attempted to ascertain from them the basis for the refusal to renew. The Contracting Of-

ficers responded only that they were acting pursuant to orders from the Eastern Regional Office of the Postal Service. LeRoy Myers then contacted the appropriate personnel in the Logistics Division and in the Legal Division of the Eastern Regional Office, but they refused to inform him of the reason for the decision not to renew. He was advised only that the Inspection Service of the Postal Service had conducted an investigation and had concluded that the contracts should not be renewed.

From May 17, 1973 until July 10, 1973, LeRoy Myers diligently attempted to learn the basis for the Postal Service's action, but the Postal Service representatives refused to provide any specific information or details concerning the nature of the investigation; when it had been conducted; who had been interviewed; or upon what findings the conclusions had been based. In this regard, no one connected with Myers, or any of the other plaintiffs, had been involved or contacted in any manner concerning the Inspection Service's investigation.

The only affirmative response provided LeRoy Myers by the Postal Service concerning the decision not to renew the contracts was that Myers should bid on the contracts when they were advertised. The Contracting Officers and the Regional Office representatives unanimously encouraged Myers to submit bids. Myers did prepare and submit bids and obtained and submitted the required bid bonds on each of the contract bids. Myers was the low bidder on two of the contracts, but by letters dated June 15 and June 19, 1973, the same Contracting Officers notified Myers that its low bids were not acceptable because Myers was a "not responsible" bidder (Appendix, pp. 43-44).

In this regard the letter dated June 19, 1973, stated in part:

> "We were recently advised, *on the basis of certain findings,* to cancel your previous contracts. It has been determined, *on the basis of these same findings,* that you are to be considered a 'not responsible' bidder." (Italics supplied.)

The last-quoted language establishes that the decision not to renew any of the contracts was based on the "same findings" which led to the conclusion that Myers was "not responsible." However, as of June 19, 1973, Myers still had not been advised as to what these alleged "findings" were.

As a result of the above sequence of events, plaintiffs were effectively deprived of their entire livelihood as of June 30, 1973, without being advised of the "findings" made by the Inspection Service of the Postal Service.

Although Myers was finally awarded the two "low bid" contracts (as hereinafter explained), the defendants have refused to award the other four contracts to Myers and have refused to compensate plaintiffs for the damages which they suffered as a result of the defendants' refusal to renew such contracts. The four contracts have been given to other persons with termination dates of June 30, 1977.

Myers' protest concerning the low bids.

This portion of the brief is included because it provides the necessary link between defendants' refusal to renew the remaining four contracts, and the basis for the plaintiffs' causes of action.

After receipt of the June 15 and June 19 letters rejecting the two low bids, Myers duly filed a "protest" pursuant to Postal Service procedures. The protest procedure included a conference with a representative of the Postal Service's general counsel on July 10, 1973. At that time, Myers was, for the first time, advised of the "findings" of the Inspection Service investigation which was the basis for the Contracting Officers' decision that Myers was "not responsible," and, necessarily (as established by the June 19 letter quoted above), also the reason for the decision not to renew any of the contracts.

At the July 10, 1973 conference, the general counsel's representative advised Myers that the Inspection Service had concluded that a certain "subcontract" arrangement between Myers and two individuals was "decidedly illegal" and that a certain cost statement submitted by Myers was "fraudulent." The subcontract which the Inspection Service had determined to be "decidedly illegal" was in fact a "truck rental agreement" which Myers had entered into effective December 14, 1970. Prior to entering into the truck rental agreement in 1970, Myers had reviewed it with the Post Office Department and was advised by the Post Office Department that the "truck rental agreement" proposed by Myers was permissible and was *not* within the Post Office Department's rules and regulations for *subcontracts*. In this regard, the general counsel stated in his decision of August 8, 1973:

> "We have verified that this interpretation (by the Post Office Department) was held" (plaintiffs' complaint, Exhibit C, p. 7).

In short, the Inspection Service of the Postal Service had effectively prevented Myers from renewing its six star route contracts because of an allegedly "illegal" subcontract which was the precise "truck rental agreement"

which the Post Office Department itself had approved in 1970 before it was put into effect by Myers. Although these points are discussed in the argument portion of the brief, it should also be noted here that the general counsel's decision also concluded, in regard to the alleged fraudulent cost statement:

> "In the absence of clear and substantial evidence of a specific intent to defraud, we cannot agree that an *isolated irregularity* in a cost statement submitted by a star route contractor is fraudulent" (plaintiffs' complaint, Exhibit C, p. 9). (Italics supplied.)

At the July 10, 1973 conference, Myers was for the first time in a position to present its position concerning the Postal Service Inspection Service investigation and findings. As a result of the July 10 conference and subsequent investigation by the general counsel, a decision dated August 8, 1973, was issued by the general counsel reversing the finding that Myers was "not responsible" (plaintiffs' complaint, Exhibit C). As a result of this decision, Myers was ultimately awarded each of the two contracts upon which it had submitted the low bids. However, the other four contracts were not affected by the general counsel's decision which was confined to the two contracts which involved the low bids.

The remaining four contracts were not awarded to Myers. Myers filed a formal claim with the Postal Service demanding that such contracts be renewed or that damages be paid, but the claim was denied (plaintiffs' complaint, par. 2).

This action was then instituted, and the defendants' motion to dismiss was granted by the district court by order and judgment filed October 2, 1974.

ARGUMENT.

POINT I.

Defendants' acti as are not protected by the provisions of 28 U.S.C. 2680 (a).

39 U.S.C. Section 409 (c):

> "The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service."

The provisions of Chapter 171 of Title 28 subject the United States to liability for tort claims although certain exceptions are set forth in 28 U.S.C. Section 2680. In the district court, the defendants placed substantial reliance on the exception in 28 U.S.C. Section 2680 (a) which states in part:

> "The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> "(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

It is plaintiffs' position that its causes of action are not based on discretionary functions or duties performed by the defendants, but are based on actions by the defendants which are defined as, and come within the realm of, those functions and duties which are deemed to be "operational" rather than discretionary.

The United States Supreme Court has consistently held that the "discretionary function" exemption in 28 U.S.C. Section 2680 (a) applies only to acts performed on the "planning" level and does not apply to activities on the "operational" level.

In *Dalehite v. United States*, 346 U. S. 15 (1953), the court determined that the acts of the government as described in the complaint in that case were immune from tort action under 28 U.S.C. Section 2680 (a). The court stated at 42:

> "In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."

In *Indian Towing Company, Inc., v. United States*, 350 U. S. 61 (1955), the court recognized the same distinction between immune discretionary acts and actionable operational acts. The court stated at 64:

> "The question is one of liability for negligence at what this Court has characterized the 'operational level' of governmental activity. (Citing *Dalehite v. United States.*) The Government concedes that the exception of Section 2680 relieving from liability for negligent 'exercise of judgment' [which is the way the Government paraphrases a 'discretionary function' in Section 2680 (a)] is not involved here, and it does not deny that the Federal Tort Claims Act does provide for liability in some situations on the 'operational level' of its activity."

The importance of the distinction drawn in the *Dalehite* and *Indian Towing Company* cases was recognized in *Moyer v. United States*, 302 F. Supp. 1235 (S. D. Fla. 1969), when the court stated at 1237:

> "The parties agree that critical to deciding whether particular acts or omissions by Government employees are protected by the 'discretionary function' exception is whether the acts or omissions occurred on the planning level or whether they occurred at the operational level. * * * In the former case, the activities would be included within the purview of the discretionary function exception, and the plaintiff's claim would be barred. However, if the acts complained of occurred at the operational level, then the full effect of Section 1346 (b) would apply and the Government would have to respond as would a private person in a similar position."

It is clear that there is a recognized distinction between those planning level activities which are immune from suit under the "discretionary function" exception in 28 U.S.C. Section 2680 (a) and those activities which are on the operational level which will subject the government to liability. The difficult determination is whether particular acts constitute planning level acts or operational level acts. In *Dolphin Gardens, Inc., v. United States*, 243 F. Supp. 824 (D. C. Conn. 1965), the court stated at 826:

> "The distinction between immunized 'discretionary functions' and negligence at the 'operational level' has not been clearly drawn * * *, and there is no litmus paper test to distinguish acts of discretion. * * *"

In regard to the problem of categorizing government acts as planning or operational, the Second Circuit Court of Appeals has stated:

> "We are convinced that each case in this area must stand on its own record" (*Blitz v. Boog*, 328 F. 2d 596 at 599 (2d Cir. 1964).

The Second Circuit has also stated that, in determining whether acts are discretionary or operational, "the language of the statute or regulation may guide the determination." *Hendry v. United States*, 418 F. 2d 774 at 783 (2d Cir. 1969).

The court in *Hendry* further concluded:

> "* * * where the grant (of a license) involves nothing more than the matching of facts against a clear rule or standard, the grant will be considered operational and not discretionary" (*Hendry, supra*, at 782).

In light of the above cases, it is necessary to examine the basis for the defendants' action in this case in order to determine whether the defendants' acts which are the subject of the plaintiffs' complaint constitute operational or discretionary activities.

The plaintiffs are claiming damages which resulted from the defendants' refusal to provide the plaintiffs with the opportunity to renew certain star route contracts, and damages resulting from the defendants' refusal to award two star route contracts to plaintiff, Myers & Myers, Inc. (as low bidder on the two contracts), effective July 1, 1973. The current statutory language which represents the foundation for the plaintiffs' causes of action is found in 39 U.S.C. Section 5005 which provides in pertinent part:

> "(a) The Postal Service may obtain mail transportation service—
>
> • • •
>
> "(4) by contract from any person * * * or carrier for surface * * * transportation under such terms and conditions as it deems appropriate, subject to the provisions of this section.

"(b)

* * *

"(2) A contract under subsection (a)(4) of this section may be renewed at the existing rate by mutual agreement between the contractor or subcontractor and the Postal Service."

Although the above-quoted statutory language is insufficient by itself to definitely establish whether the defendants' actions in this case were operational or discretionary, an analysis of the history and origin of the current statute clearly illustrates the unique considerations applicable to star route contractors, such as plaintiffs, which led to the enactment of this legislation.

The current statute was originally enacted as Chapter 500—Public Law 669, which was approved June 19, 1948. The purpose of the act and the intention of Congress in passing the act are descriptively set forth in House Report No. 2003, May 20, 1948 (Vol. 2, U. S. Code, Cong. Service, 80th Congress, Second Session, 1948, pp. 1864-1867). It is our position that the House Report is extremely significant to the plaintiffs' case, and we included the text of the report as Exhibit I in plaintiffs' memorandum of law submitted to the District Court.

The House Report establishes that the purpose of the statute was to provide protection and security for star route contractors. In this regard, as indicated in the report, there was substantial consideration given to the idea of providing the contractor with Civil Service status. However, because of circumstances which at that time indicated that Civil Service status could in some ways be detrimental to the star route contractors (again, the interests of the star route contractors were primary), the

alternative of providing statutory authority to renew and renegotiate star route contracts was enacted as Public Law 669.

Since a complete copy of the House Report is included in the record (plaintiffs' memorandum of law, Exhibit I) we will not quote it at length but we feel that certain segments of the report should be included here. The report states in part:

> "Under practices which have grown up through the years, the holders of existing star route contracts are possessed of a sense of insecurity because of the necessity of placing these routes up for bidding every 4 years. The star route contractors have themselves made substantial personal investment in equipment to carry the mail.
>
> • • •
>
> "It is the view of the committee a solution should be found in this session of Congress to the insecurity of the star route contractors and the unfair cutthroat bidding practices that have grown up through the years eliminated. Under these bidding practices we find many honest, sincere, and conscientious star route carriers who have given years of service, losing their routes because they have been underbid by a few dollars.
>
> • • •
>
> "Senate 263 as amended will eliminate insecurity, prevent cutthroat bidding, retain the service of honest and conscientious star route carriers and permit a flexible procedure for adjustment based upon changing economic conditions. As can be seen, the amendment, while meeting the problem is not subject to difficulties which would beset the establishment of the carriers under a civil service system.
>
> "The committee points out that to be effective this legislation will require that the Postmaster

> General administer the law with the purpose of using it as a tool to eliminate the inequities existing in the star route system.
>
> "It is the view of the committee that in cases where service has been satisfactorily performed by existing contract holders, the Postmaster General should approach the problem of letting new contracts or making adjustments in existing contracts based upon changing economic conditions from a viewpoint sympathetic to the existing contract holder" (2 U. S. Code, Cong. Service, *supra*, at 1865-1866).

The plaintiffs in this case represent the classic example which led to the enactment of Public Law 669 [now 39 U.S.C. 5005 (b)(2)]. The plaintiffs have earned their livelihood as star route contractors for over 26 years which should qualify them as "honest, sincere, and conscientious" star route carriers who have given years of service (2 U. S. Code, Cong. Service, *supra*, at 1866). These are the precise individuals who were to be protected by "669." Their investment amounted to over $77,000 in vehicles and equipment, and their entire business was devoted to the star route contracts.

The House Report establishes that "where service has been satisfactorily performed by existing contract holders" the Postmaster General was directed to make adjustments in existing contracts from a viewpoint "sympathetic to the existing contract holder" (2 U. S. Code, Cong. Service, *supra*).

In short, the legislative history unequivocally sets forth the direction to the post office to provide protection for the star route contractors. There was established a duty to renew the star route contracts on negotiated terms which were fair and equitable to the star route contractor.

In 1950, the Postal Service Law was again amended in order to extend the renewal right to subcontractors on star routes. Senate Report No. 1839 reiterated the special status which Public Law 669 had provided star route contractors. The report states in part:

> "The legislative history of this statute indicates a congressional intent to eliminate the necessity for competitive bidding for star route contracts in cases where the prime contractor has rendered faithful service and wishes to extend his contract, thereby removing the insecurity of star route contractors occasioned by alleged 'cutthroat' bidding when competitive bidding is resorted to" (2 U. S. Code, Cong. Service, 81st Congress, Second Session, 1950, p. 2594; record, Exhibit H, attachment to plaintiffs' memorandum of law).

It is evident from the above-cited legislative history that star route contractors who have "faithfully and satisfactorily performed the contract" are entitled to a "sympathetic viewpoint" at the termination date of the contract. The legislative history unequivocally establishes that star route contracts were to be renewed if the star route contractor had been faithful and satisfactory in performance of the contracts, and "wishes to extend his contract."

It is certain that plaintiff, Myers & Myers, Inc., wished to extend its contracts as evidenced by the renegotiation procedures which plaintiff, Myers & Myers, Inc., and defendants participated in during 1972-1973 relative to the renewal of the Myers, Inc. star route contracts (plaintiffs' complaint, pars. 11 and 12).

As previously stated, Congress intended to eliminate unnecessary "cut-throat" bidding which resulted in the loss of contracts for faithful star route contractors. Even

if the defendants believed that they had justifiable reasons for refusing to renew the Myers' contracts, it is plaintiffs' position in this action that the "sympathetic viewpoint" referred to in the legislative history required the defendants, at the very minimum, to afford plaintiffs the fundamental right to be advised of the charges against them and to provide plaintiffs with the opportunity to respond to such charges. In addition to the general concept that every person is entitled to such basic rights, the present case involves plaintiffs who had devoted over 26 years as star route contractors—plaintiffs whose entire business was dependent on the star route contracts. The defendants refused to even advise these plaintiffs of the charges against them, and the action which the defendants took based on those charges effectively took away plaintiffs' livelihood.

In this regard, in the decision by the general counsel for the Postal Service which has been referred to previously, the general counsel stated in part:

> "Furthermore, it appears that the procedures followed here effectively denied the protestant (Myers & Myers, Inc.) the opportunity to defend against the charges of misconduct on which the determinations of nonresponsibility were based and, without benefit of a hearing, apparently have barred it from consideration for star route contract awards for an indeterminate time.
>
> "* * * The terms and conditions under which firms and individuals may be debarred or suspended from contracting with the Postal Service are set out in the Postal Contracting Manual, Section 1, Part 6. They provide, among other things, for notice, an opportunity for a hearing, and a limited period of suspension or debarment. Neither suspension nor debarment was invoked in the case of protestant. Consequently, protestant was not

> accorded that 'fundamental fairness' recognized and required by the court in *Horne Brothers, Inc., v. Melvin R. Laird* (USCA, DC), 463 F. 2d 1268 (1973)" (plaintiff's complaint, Exhibit C, pp. 9-10).

In the same decision the general counsel stated:

> "The Comptroller General has held that low bids should not be rejected successively for nonresponsibility without the bidders being afforded an opportunity to be heard. See 43 Comp. Gen. 140.
>
> "While there was not a successive rejection of low bids in the instant case, but rather a simultaneous rejection, we believe the rule requiring an opportunity to be heard is applicable in view of the four year duration of the contracts and the fact that the nonresponsibility determinations were based on allegations of past misconduct" (*ibid.*, pp. 9-10).

Although the above quoted language refers specifically to the decision relating to only two of the plaintiffs' star route contracts, the rationale is applicable to the plaintiffs' present action. It is plaintiffs' position that if ever a govenmental agency had breached its duty to a private citizen so as to be answerable in damages, the defendants in this case have done so.

Even if the charges against the plaintiff, and the conclusions which the defendants reached based on those charges, had any validity, the plaintiffs were entitled to the opportunity to hear the charges and respond to them. In the present case, not only were the plaintiffs refused the fundamental right to be advised of the allegations against them, but the substance of the charges, and the conclusions reached by the defendant, Postal Inspection Service, have been refuted and reversed by the defendant Postal Service's own general counsel (plaintiffs' complaint, Exhibit C).

It is not possible for defendants to deny that, if plaintiffs had been duly and timely advised of the charges against them, the contracts would have been renewed with the plaintiffs. Plaintiffs' conclusion in this respect is based on the fact that, after the Contracting Officers for the Postal Service refused to award the two low bid contracts to plaintiff Myers & Myers, Inc., on the grounds that Myers was "not responsible," the general counsel reviewed the entire situation, which, for the first time, included the Myers' side of the alleged charges, and the general counsel concluded that Myers was "responsible." Furthermore, it is undeniable that the Postal Service Contracting Officers relied on the same charges in determining that none of the plaintiffs' other contracts would be renewed (Postal Service letter of June 19, 1973, Appendix p. 44).

Although we have referred several times to the general counsel's decision, we again refer to it here because that decision clearly sets forth the circumstances involved in defendants' illogical and inconsistent decisions and directions concerning the Myers' truck rental agreement. The following simplification of the essential facts, we feel, illustrates a classic example of a governmental agency's right hand not knowing what its left hand was doing, and, further, establishes that the internal confusion in the Postal Service, and its failure to follow its own procedures, resulted in the plaintiffs' financial devastation. As previously stated, it was defendants' concentration on the "decidedly illegal subcontract" which has placed plaintiffs in the position which they are in now, and the following chronology of events supports the plaintiffs' position that the entire matter could have been avoided if defendants had merely promptly advised Myers of the charges:

1. On December 14, 1970, an agreement identified as a "truck rental agreement" was executed by plaintiff, Myers & Myers, Inc., and two other parties, Wayman and Jagger. Prior to the execution of this "truck rental agreement" Myers & Myers, Inc., had presented the proposed agreement to United States Post Office officials who advised Myers that such an agreement was valid and could be used as intended by Myers.

In this regard, the general counsel's decision states:

> "Protestant (Myers & Myers, Inc.) discussed with the Post Office Department the agreement with Wayman and Jagger before it was executed and was informed that as a truck rental agreement it did not fall within the requirements for subcontracts. We have verified that this interpretation was held" (plaintiffs' complaint, Exhibit C at p. 7).

2. On or about August 15, 1972, Myers & Myers, Inc., was advised by an official of the Binghamton, New York Post Office that the "truck rental agreement" was not acceptable and would have to be revised by October 1, 1972. Upon receiving this notification and direction from the Binghamton Post Office official, Myers & Myers, Inc., immediately took steps to comply with the order from the post office. (This immediate response by Myers & Myers, Inc., represents, in our opinion, another example of the fact that Myers & Myers, Inc., faithfully performed as a star route contractor and diligently made every effort to comply with any and all post office regulations and directives.) All necessary steps were promptly taken in August of 1972 to prepare a new agreement between Myers & Myers, Inc., and Wayman and Jagger (plaintiffs' complaint, Exhibit C, p. 4).

3. However, before the new agreement, as directed by the Binghamton, New York Post Office official, could be completed and executed, Myers & Myers, Inc., received a further notification on or about September 14, 1972, that the Postal Service was revising its regulations regarding "truck rental agreements" and therefore the December 14, 1970 "truck rental agreement" between Myers & Myers, Inc., and Wayman and Jagger did *not* need to be changed (plaintiffs' complaint, Exhibit C, pp. 4-5). As a result of this September 14, 1972 notification, the "truck rental agreement" executed by Myers & Myers, Inc., on December 14, 1970, was not revised, and it remained in effect.

4. The final step in the Postal Service's inconsistent attitude toward the "truck rental agreement" was to issue six separate letters on May 16 and May 17, 1973, advising Myers that none of its contracts would be renewed. However, those letters did not state any reason for the refusal to renew the contracts, and, despite diligent and repeated efforts by Myers to learn the reasons for the refusal to renew, Myers was not advised of the basis for the Postal Service's action until July 10, 1973. By that date, all of the contracts had been awarded to other contractors.

The above sequence of events was explained to the general counsel of the Postal Service on July 10, 1973, when Myers was first informed that its star route contracts had not been renewed because of this allegedly "illegal subcontract." At the July 10, 1973 conference with the general counsel's office, Myers submitted documentation concerning the truck rental agreement and the events outlined in steps 2 and 3 above. As previously indicated, subsequent to the July 10, 1973 conference between Myers and the general counsel's office, the general counsel issued its decision in favor of Myers (plaintiffs' complaint, Exhibit C).

A case substantially similar to the present action was decided by the United States Court of Appeals for the District of Columbia. *Horne Brothers, Inc., v. Melvin R. Laird,* 463 F. 2d 1268 (D. C. Circuit 1972). In *Horne,* a contractor had been suspended as a bidder on Department of Defense contracts. The contractor, Horne Brothers, Inc., brought an action alleging that the Secretaries of Defense and Navy had acted in violation of law by issuing the suspension and by refusing to award Horne a repair contract on a naval vessel. The District Court issued a preliminary injunction directing the defendants to order the cessation of performance of the contract by another contractor. The Court of Appeals stayed the injunction and continued the stay pending the determination of the Government's motion and appeal in the Court of Appeals.

The Court of Appeals stated that in Horne's particular case it was unlikely that Horne would prevail on the merits, and therefore, the injunction was reversed. However, the Court of Appeals stated:

> "We make clear that we agree with the premises of the District Court that there are serious and fundamental questions regarding the fairness of procedures utilized by the Govenment in suspending contractors." *Horne,* 463 F. 2d at 1269.

The court pointed out the problems presented by the suspension procedures authorized under Armed Services Procurement Regulations which provided that the Secretary of Defense could suspend a bidder, upon finding of adequate evidence if improper or unlawful activities, from participating in government contract awards. The court stated:

"This procedure does not require that the suspended contractor be offered an opportunity to confront his accusers and to rebut the 'adequate evidence' against him. Yet the suspension may be continued for eighteen months or more. While we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor, that cannot be sustained for a protracted suspension. As we pointed out in *Gonzalez v. Freeman*, 334 F. 2d 570, 578 (1964):

"'On this record there is neither the appearance nor the reality of fairness in the process by which debarment of appellants was accomplished. Disqualification from bidding or contracting for five years directs the power and prestige of government at a particular person and, as we have shown, may have a serious economic impact on that person. Such debarment cannot be left to administrative improvisation on a case-by-case basis. *The governmental power must be exercised in accordance with accepted basic legal norms.* Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include *notice of specific charges, opportunity to present evidence and to cross examine adverse witnesses*, all culminating in administrative findings and conclusions based upon the record so made.'" *Horne*, at 1270-1271. (Italics supplied.)

The court stated:

"While *Gonzalez* related to a five year disqualification, we think an action that 'suspends' a contractor and contemplates that he may dangle in suspension for a period of one year or more, is such as to require the Government to insure fundamental fairness to the contractor whose economic life may depend on his ability to bid on govern-

ment contracts. That fairness requires that the bidder be given specific notice as to at least some charges alleged against him, and be given, in the usual case, an opportunity to rebut those charges."

The court concluded:

"As to the specific case of *Horne* and the *U.S.S. Francis Marion* contract, however, it was only three weeks after Horne was placed in a suspended status, on December 14, that its bid for the repair contract was rejected by the Department of Navy. In our view, under any proper procedural scheme the government should be permitted a reasonable time, after it has notified a suspended bidder of his suspension status, before it must conduct a proceeding attended by the contractor and his representative, to provide an opportunity to offer evidence to rebut charges and confront accusers, in short, to demonstrate the lack of adequate evidence to warrant suspension.

"During this interim period, not to exceed one month, the Government could make arrangements for the proceeding and also solidify its position by further preparation of its case; presumably the time would be used to check records and documents, examine additional witnesses, etc. Since Horne's bid was turned down by the Navy within a month of its suspension we do not find any error in that action even though no opportunity had been accorded Horne at that time." *Horne*, at 1272.

The court also stated in a footnote:

"The suspension of Horne has lasted for over five months. During this time, Horne's bids on numerous additional Government contracts have been rejected because of its suspended status. The District Court is not without power to fashion relief for Horne as to matters arising subsequent

> to (a) the one month period following the suspension notice and (b) the denial of Horne's request for an opportunity to be heard." *Horne,* footnote 10 at 1273.

The *Horne* case provides support for the plaintiffs' present action. Until July 10, 1973, which was 54 days after the notification to the plaintiff, Myers & Myers, Inc., that its contracts would not be renewed, the charges against Myers were not revealed to Myers. During that time, Myers contacted Postal Service officials repeatedly to attempt to obtain information as to the reasons for the defendants' action. In the meantime, all of Myers contracts were awarded to other contractors. If the charges against Myers had been revealed to Myers, it is certain that the "serious economic impact" which has resulted for Myers would have been avoided.

Because of the Government's action, creditors of Myers & Myers, Inc., with claims in excess of $20,000, have gone unpaid since June of 1973. Fortunately, because of Myers' long-standing reputation in the community and because of the sound relationship which has existed over the years between Myers & Myers, Inc., and these creditors, the creditors have patiently waited while Myers pursues this action against the Government. Additionally, the plaintiff, Leroy B. Myers, was compelled to obtain a personal loan and mortgage his own home in order to salvage sufficient equipment and vehicles to operate the two contracts on which the low bids had been submitted. (Myers was not able to continue the monthly payments on the vehicles used to operate the other four contracts and those vehicles were returned to the secured creditors.) All of this financial loss would have been prevented if the defendants had merely communicated the charges to Myers & Myers, Inc., on May 16 and May 17, 1973, when the results of the Postal Inspection Service Investigation

had been completed. Myers would have immediately submitted the proof and documentation which was ultimately provided by Myers on July 10, 1973, and which clearly established that the charges were without basis. The matter would have been resolved in a manner satisfactory to all concerned.

POINT II.

The law and the cases establish that the defendants were performing operational level acts rather than immune discretionary functions.

There are not any absolute factors which can be applied to every situation to determine whether an act is operational or discretionary. However, two principles relied upon by the Second Circuit in *Hendry, supra,* appear to be appropriate in this case. First, the court in *Hendry* concluded that the language of the relevant statute or regulation may guide the determination (that is, the determination whether the acts were operational or discretionary). Second, although we have previously quoted from the court in *Hendry,* we feel that the following statement is sufficiently important to requote it here. The court stated at 782:

> "• • • where the grant involves nothing more than the matching of facts against a clear rule or standard, the grant will be considered operational and not discretionary."

Both of these guidelines as set forth in *Hendry* support plaintiffs' position that the motion to dismiss should have been denied.

The legislative history of Public Law 669 establishes the intent of the statute, and defines the "clear rule or standard to be applied," namely, faithful and satisfactory service plus a desire by the contractor to extend his contract. Consequently, the Postal Service was under a duty to simply "match the facts" against the standard. Here, the standard was indisputably complied with by plaintiffs, but the Postal Service failed to renew the star route contracts. This failure did not involve discretion, but simply involved an operational activity which in this case was negligently performed. In a case involving this issue the court stated:

> "Thereafter Captain Stinchcomb had no discretionary function. His duty was to issue the permits, provided only, that the normal qualifications were met by the applicant. The issue then arises as to whether Captain Stinchcomb made reasonable inquiry as to this before actually handing over the permits. To this extent the complaints are sufficient and the defendant's contention that their allegations are without foundation and subject to dismissal, must fail." *Pennsylvania R. R. Co. v. United States*, 124 F. Supp. 52 at 64 (D. C. N. J. 1954).

The same rationale applies in the present case. The plaintiffs satisfied the "normal qualifications," and the star route contracts should have been renewed by the Postal Service.

The case of *Duncan v. United States*, 355 F. Supp. 1167 (Dist. Ct. D. C. 1973), provides support for the plaintiffs' position in the present case. Because of the analogous procedural steps involved in *Duncan*, we will refer to the facts in that case in some detail. Duncan, the plaintiff, was a commercial airline pilot employed by National Airlines, Inc. On June 6, 1968, the Federal Aviation Ad-

ministration (F.A.A.) administrator issued an emergency order pursuant to regulations revoking Duncan's airman medical certificate because he had failed to furnish the F.A.A. with certain requested medical information. At a subsequent hearing before the National Transportation Safety Board (NTSB) the plaintiff submitted the requested medical information, and the hearing examiner dismissed the F.A.A.'s complaint against him. Upon appeal by the F.A.A., the full NTSB affirmed the examiner's decision on August 22, 1968.

Subsequently, upon review of the medical reports submitted by Duncan to determine his qualifications for reissuance of an airman medical certificate, the F.A.A. denied him recertification on September 20, 1968. Plaintiff then filed a petition for review of the denial at the NTSB. The hearing examiner ruled in favor of plaintiff. An appeal was taken by the F.A.A. and on January 5, 1970, the NTSB affirmed the decision of the hearing examiner. Plaintiff was thereafter restored to flying status.

Claiming money damages from September 20, 1968 to January 5, 1970, Duncan filed a claim for administrative settlement with the administrator of the F.A.A. on September 8, 1970, which claim was denied in writing on February 2, 1971. He then commenced this action for money damages on June 11, 1971, pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), alleging negligence on the part of agents and employees of defendant, and also interference by the defendant with his prospective economic advantage.

The defendant moved to dismiss the complaint on the grounds that in refusing to reissue an airman medical certificate to plaintiff, the F.A.A.'s action constituted an exercise of a discretionary function and was thus not

cognizable under the Federal Tort Claims Act, 28 U.S.C. 2680(a), and, secondly, that the act expressly excepts from its scope any claim arising out of interference with contract rights. 28 U.S.C. 2680(h).

In determining that the plaintiff's complaint should not be dismissed under Section 2680(a), the court stated at 1169:

> "The Federal Tort Claims Act does not define 'discretionary function,' but in determining whether discretion exists as contemplated within the purview of the Act, it is pertinent to inquire whether the complaint attacks on the one hand the nature of rules which a government agency has formulated, or on the otherhand the way in which these rules are applied. * * * Plaintiff here does not controvert the power of the F.A.A. Administrator to make rules concerning the certification of airline pilots; rather he alleges negligence in the application of the established standards of certification."

The court then concluded at 1170:

> "Where the grant of a license depends upon the balancing of several factors and the grant or refusal to grant is made without reliance upon any readily ascertainable rule or standard, the courts will hold the judgment to be discretionary. * * * But where clear standards are set forth to which are matched the actual individual facts, the courts will hold the judgment to be operational and not discretionary."

The court concluded that the F.A.A. Administrator's decision in *Duncan* was operational rather than discretionary. The plaintiffs in the present case are in a similar position. The star route contracts should have been renewed if performance had been satisfactory. There has never been any indication that the performance was unsatisfactory, and, since the Postal Service was acting on

an operational level, it was obligated to apply the "readily ascertainable rule or standard," namely, satisfactory service, and consequently renew the contracts with the plaintiffs.

We also believe it is relevant that in *Duncan* the plaintiff was advised of the charges against him and was given full opportunity to respond and present his proof. In the present case, plaintiffs were not even advised of the nature of the charges until July 10, 1973, which was after each of the contracts had already been awarded to other contractors.

A final argument concerning 28 U.S.C. 2680(a) is appropriate. The language in 39 U.S.C. 5005(b)(2) is somewhat ambiguous in providing that star route contracts "may be renewed by mutual agreement" with the Postal Service. However, the Supreme Court has recognized the importance of legislative history in construing equivocal statutory language:

> "It is familiar doctrine that where a statute confers a power to be exercised for the benefit of the public or of a private person, the word 'may' is often treated as imposing a duty rather than conferring a discretion. * * * This rule of construction is by no means invariable. Its application depends on the context of the statute, *and on whether it is fairly to be presumed that it was the intention of the legislature* to confer a discretionary power or to impose an imperative duty. * * * The argument of the defendants is that 'may' in this section means 'must'; and reliance is placed upon a well-known rule in the construction of public statutes, where the word 'may' is often construed as imperative. Without question *such a construction is proper in all cases where the legislature means to impose a positive and absolute duty,* and not merely to give a discretionary power. But no general rule can be

> laid down upon this subject, further than that that exposition ought to be adopted in this as in other cases, *which carries into effect the true intent and object of the legislature in* the enactment. * * *" *United States ex rel. Siegel v. Thoman,* 156 U. S. 353 at 359 (1895). (Italics added.)

It is our position that the legislative history concerning 39 U.S.C. 5005(b)(2) establishes the intent of Congress to impose a duty to renew the star route contracts rather than to provide the Postal Service with blanket discretionary power in this area.

POINT III.

Plaintiffs have alleged causes of action which are not within 28 U.S.C. 2680 (h).

In the *Duncan* case, *supra*, 355 F. Supp. 1167, the government also requested the court to strike the allegation in the complaint regarding misrepresentation and medical malpractice. The court stated at 1171:

> "Plaintiff states, however, that these allegations go to negligence in conduct and not to the fact of misrepresentation itself. If such be the case, the Court's decision on this part of the motion must be left for further motion based upon a fuller development of the facts."

The last quoted language also applies to the present case, and the Government's reliance on 28 U.S.C. Section 2680 (h) is not appropriate because the plaintiffs' allegations "go to negligence in conduct" in each and every cause of action in the complaint.

In this regard, the plaintiffs' case is substantially similar to *Hendry v. United States*, 418 F. 2d 774 (2d Cir.

1969). In that case, the court held that the plaintiffs' claim was not barred by either subsection (a) or (h) of 28 U.S.C. Section 2680. In *Hendry*, the plaintiff had been licensed by the United States Coast Guard in 1943 as qualified to sail as Master of a steam vessel, and until 1962 he served on Merchant Marine vessels as a deck or watch officer. His fitness for sea duty came into question in 1962, and he agreed to submit to medical examinations at the request of the Coast Guard. Pending the outcome of the examinations, he agreed to deposit his license with the Coast Guard until such time as he was declared fit for sea duty, and he further agreed that pending his certification he would not accept employment on any merchant vessel of the United States.

The Coast Guard arranged to have the psychiatric and psychological examinations and tests performed, and the examining psychiatrist reported that the plaintiff was not fit for sea duty. The plaintiff obtained an examination by his own psychiatrist who disagreed with the Coast Guard's examiner. A subsequent examination by the Coast Guard's Chief of Psychiatric Services resulted in a report that the plaintiff was fit for sea duty. Consequently, the Coast Guard restored the plaintiff's license to him, and he was pronounced fit for sea duty.

The Second Circuit defined the plaintiff's action in *Hendry* as follows:

> "The within action was then instituted. Appellant seeks $50,000 in alleged damages caused by the claimed negligence and malpractice of the agents of the United States, Doctors Ramirez and Feuerburgh, professional employees of the U. S. Public Health Service. Jurisdiction was based on the Federal Tort Claims Act, Title 28 U.S.C. Section 1346 (b), Section 2571 *et seq*. *Hendry* claimed that

> negligent psychiatric examinations by the doctors caused him to lose wages for the period of three and one-half months that elapsed during the suspension of his license. He also claimed that, as a result of these negligent examinations, he suffered mental and physical hardship and anguish and was damaged in his reputation" (*Hendry, supra*, at 778).

The claims by the plaintiffs in the present action are analogous to Hendry's claims. The plaintiffs here alleged that the negligent investigation by the Postal Service resulted in the refusal by the Postal Service to renew the star route contracts which refusal resulted in the losses, damages, and injuries detailed in the complaint.

In *Hendry*, the court held that the claims were not barred by 28 U.S.C. 2680 (a) or (h). Although the court did not specifically define the nature of the plaintiff's cause of action in that case, the court stated at 779:

> "In light of this it appears to us that if Hendry had been negligently examined and reported on by private physicians he could sustain a claim for lost wages under New York Law."

The court in *Hendry* also held that the plaintiff's claim for compensation for mental anguish caused by suspension of his license stated a cause of action under New York law which permits recovery of damages for emotional and mental upset suffered by reason of proved negligence even though there is no proof of a corresponding physical symptom. *Hendry, supra*, at 779-780; citing *Ferrara v. Galluchio*, 5 N. Y. 2d 16, 176 N. Y. S. 2d 996, 152 N. E. 2d 249 (1958).

POINT IV.

Defendants failed and refused to provide plaintiffs with notice and an opportunity to be heard.

It is the plaintiffs' position that their claims are also supported by *Greene v. McElroy*, 360 U. S. 474 (1959).

In *Greene*, a security clearance previously granted to plaintiff Greene (a private employee) was revoked by the Department of Defense in a proceeding in which Greene had no opportunity to confront and cross examine either persons whose statements reflected adversely on him or the government investigators who took their statements. As a consequence of the loss of the security clearance, he was discharged from his employment and was unable to find other equivalent employment. The United States District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit affirmed the government's motion for summary judgment. The Supreme Court reversed and remanded the case to the District Court. In reaching its decision the Supreme Court stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Govenment's case must be disclosed to the individual so that he has an opportunity to show that it is untrue" (360 U. S. at 496).

The court then referred to the importance of cross examination in protecting individual rights. The court stated:

> "Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally" (360 U. S. at pp. 497-499).

The court in *Greene* concluded:

> "In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross examination" (360 U. S. at p. 508).

In the *Greene* case the plaintiff had contended that the government action had denied him liberty and property without due process of law in contravention of the Fifth Amendment. The court pointed out that the alleged property was petitioner's employment; and the alleged liberty

was petitioner's freedom to practice his chosen profession. In this regard the court stated:

> "* * * the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment * * *" (360 U. S. at p. 492).

The present case appears indistinguishable from *Greene v. McElroy* and supports the plaintiffs' position that their case should not be dismissed. In refusing to renew the star route contracts with plaintiffs, defendants relied exclusively on statements from individuals whose identity was not revealed to the plaintiffs. In addition, the nature of the statements made against the plaintiffs was not revealed to the plaintiffs until on or about July 10, 1973, which was two months after the Postal Service decision not to renew the contracts, and subsequent to the date when the contracts were awarded to other persons. As indicated in the *Greene* decision, and based on fundamental notions of law, plaintiffs should have at least been given the opportunity to respond to the charges prior to the severe action taken by the defendants.

Although the court in *Greene* was unable to identify any particular established rules or procedures governing that situation, the Postal Service has promulgated clear and express procedural requirements relative to the type of action taken against the plaintiffs (39 C.F.R. Part 956, Debarment and Suspension Regulations; 39 C.F.R. Part 957, Rules of Practice in Proceedings Relative to Debarment and Suspension from Contracting).

The Regulations and Rules of Practice in 39 C.F.R. Part 957 require a hearing with the opportunity for the individual to appear and respond to the charges. In regard to "Evidence," 39 C.F.R. 957, 16 (b), provides:

> "Testimony shall be under oath or affirmation and *witnesses shall be subject to cross examination.*" (Italics added.)

Such procedural safeguards were completely ignored by the Postal Service in its action against the plaintiffs.

Conclusion.

Plaintiffs request that the order and judgment of the district court be reversed and a decision be rendered that the district court has jurisdiction to entertain plaintiffs' claims.

Dated: February 4, 1975.

Respectfully submitted,

HINMAN, HOWARD & KATTELL,
Attorneys for Plaintiffs-Appellants,
724 Security Mutual Building,
Binghamton, N. Y. 13901
(607) 723-5341.

JOHN C. FISH,

APPENDIX.

UNITED STATES POST OFFICE

Syracuse, New York 13201

130:PM:WEP:wvb

May 16, 1973

Myers & Myers, Inc.
Box #1
Port Crane, NY 13833

Gentlemen:

The present highway transportation contract on Star Route 13011 (SCF Syracuse-Binghamton), for which you are the contractor, will expire on June 30, 1973.

This is to advise you that a determination has been made not to renew the contract on Star Route 13011 on expiration of the current contract term.

Very truly yours,

DAVID S. GRUTHARD
Assistant PM
WILLIAM E. PECK
Contracting Officer

cc: Director, Logistics Division
Eastern Region
District Manager
Postmaster, Binghamton, NY
Peerless Insurance Co.
file

UNITED STATES POST OFFICE

Binghamton, New York 13902

In Reply Refer To
GWD/F/vmt

May 17, 1973

Certified Mail

Myers & Myers, Inc.
Box #1
Port Crane, NY 13833

Gentlemen:

The present highway transportation contract on Star Route 13711 (SCF Binghamton—SCF Utica), for which you are the contractor, will expire on June 30, 1973.

This is to advise you that a determination has been made not to renew the contract on Star Route 13711 on expiration of the current contract term.

Sincerely,

JOHN A. FLYNN
for
G. WILLIAM DELAMAR
Contracting Officer

cc:

Director, Logistics Division,
Eastern Region
District Manager
Postmaster, Utica NY
Peerless Insurance Co.
File

UNITED STATES POST OFFICE

Binghamton, New York 13902

In Reply Refer To
GWD/F/vmt

May 17, 1973

Certified Mail

Myers & Myers, Inc.
Box #1
Port Crane, NY 13833

Gentlemen:

The present highway transportation contract on Star Route 13713 (SCF Binghamton—SCF Jamestown), for which you are the contractor, will expire on June 30, 1973.

This is to advise you that a determination has been made not to renew the contract on Star Route 13713 on expiration of the current contract term.

Sincerely,

JOHN A. FLYNN
for
G. WILLIAM DELAMAR
Contracting Officer

cc:

Director, Logistics Division,
Eastern Region
District Manager
Postmaster, Jamestown NY
Peerless Insurance Co.
File

UNITED STATES POST OFFICE

Binghamton, New York 13902

In Reply Refer To
GWD/F/vmt

May 17, 1973

Certified Mail

Myers & Myers, Inc.
Box #1
Port Crane, NY 13833

Gentlemen:

The present highway transportation contract on Star Route 13730 (SCF Binghamton—Corbettsville), for which you are the contractor, will expire on June 30, 1973.

This is to advise you that a determination has been made not to renew the contract on Star Route 13730 on expiration of the current contract term.

Sincerely,

JOHN A. FLYNN
for
G. WILLIAM DELAMAR
Contracting Officer

cc:

Director, Logistics Division,
Eastern Region
District Manager
Postmaster, Corbettsville NY
Peerless Insurance Co.
File

UNITED STATES POST OFFICE

Binghamton, New York 13902

In Reply Refer To
GWD/F/vmt

May 17, 1973

Certified Mail

Myers & Myers, Inc.
Box #1
Port Crane, NY 13833

Gentlemen:

The present highway transportation contract on Star Route 13732 (SCF Binghamton—Owego), for which you are the contractor, will expire on June 30, 1973.

This is to advise you that a determination has been made not to renew the contract on Star Route 13732 on expiration of the current contract term.

Sincerely,

JOHN A. FLYNN
for
G. WILLIAM DELAMAR
Contracting Officer

cc:

Director, Logistics Division,
Eastern Region
District Manager
Postmaster, Owego NY
Peerless Insurance Co.
File

UNITED STATES POST OFFICE

Binghamton, New York 13902

In Reply Refer To
GWD/F/vmt

May 17, 1973

Certified Mail

Myers & Myers, Inc.
Box #1
Port Crane, NY 13833

Gentlemen:

The present highway transportation contract on Star Route 13736 (SCF Binghamton—North Norwich, SCF Utica—Smyrna) for which you are the contractor, will expire on June 30, 1973.

This is to advise you that a determination has been made not to renew the contract on Star Route 13736 on expiration of the current contract term.

Sincerely,

JOHN A. FLYNN
for
G. WILLIAM DELAMAR
Contracting Officer

cc:

Director, Logistics Division,
Eastern Region
District Manager
Postmaster, No. Norwich NY
" Utica NY
" Smyrna NY
Peerless Insurance Co.
File

UNITED STATES POST OFFICE

Syracuse, New York 13201

PM:WEP:wvb

June 15, 1973

Myers & Myers, Inc.
Box #1
Port Crane, N. Y. 13833

Gentlemen:

Enclosed find "Abstract of Bids or Proposals Received-Transportation Services Contract" for Solicitation No. 130-10-73 on Star Route 13011 (SCF Syracuse-SCF Binghamton).

As indicated on the attached abstract, your bid was the lowest of the proposals received.

This is to advise you that based on information furnished this office you have been considered unresponsible. I have therefore elected not to consider your low bid for award.

Very truly yours,

WILLIAM E. PECK
Postmaster
Syracuse, N. Y. 13201

cc: Peerless Insurance Company
Keene, N. H.
Director, Logistics Division
Eastern Region

UNITED STATES POST OFFICE

Binghamton, New York 13902

In Reply Refer To
GWD/vmt

June 19, 1973

Myers & Myers, Inc.
P. O. Box 1
Port Crane, NY 13833

Gentlemen:

Enclosed is Form 7436 for Highway Transportation Bid and Contract Solicitation #13730. This indicates that your bid was the lowest received.

We were recently advised, on the basis of certain findings, to cancel your previous contracts. It has been determined, on the basis of these same findings, that you are to be considered a 'not responsible' bidder.

Therefore, your bid for this contract will not be considered by us for award.

Sincerely,

G. WILLIAM DELAMAR
Contracting Officer

Enc.

cc:

Dist. Mgr., Scranton
Logistics Div., East. Reg.
Mail Processing Div., "
Mgr., Transpn. Serv. Br.

Order.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

MYERS & MYERS, Inc., LEROY B. MYERS, VIVIAN E. MYERS, and THOMAS L. MYERS,

Plaintiffs,

vs.

UNITED STATES POSTAL SERVICE, UNITED STATES POSTAL INSPECTION SERVICE, WILLIAM G. DELAMAR, Individually and as Contracting Officer for the United States Postal Service, WILLIAM E. PECK, Individually and as Contracting Officer of the United States Postal Service, and THE UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 74-CV-138

A Motion to Dismiss having been made by defendants through James M. Sullivan, Jr., United States Attorney for the Northern District of New York, Gustave J. DiBianco, of counsel, and said Motion having come on to be heard on September 23, 1974, in Utica, New York, and James M. Sullivan, Jr., Gustave J. DiBianco, of counsel, having appeared in support of said Motion, and Hinman, Howard & Kattell, John C. Fish, of counsel, having appeared in opposition thereto,

Now upon all proceedings had herein, and upon all papers filed herein, due deliberation having been had thereon, and

Order

IT APPEARING that this Court lacks jurisdiction to entertain this claim, it is

ORDERED that the Motion to Dismiss the entire Complaint is granted in all respects, and said action be and hereby is dismissed.

Dated this 28th day of September, 1974, at Auburn, New York.

Enter

EDMUND PORT
United States District Judge

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e Reporter Company, Inc., Printers at Walton, New York.

That on the 12th day of February , 1975 , at the
quest of Hinman, Howard & Mattell, Attorneys at Law,

served two copies of a Brief and Appendix entitled
yers & Myers vs. U. S. Postal Service" on

ustave J. DiBianco, United States Attorney, Northern District
of New York,

depositing said two copies in postpaid wrapper at 4 p. m. on
is day, in the United States Postoffice at Walton, New York,
dressed to the above

stave J. DiBianco, United State Attorney, Federal Building,
Syracuse, New York 13201

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William Finch

Sworn to before me
is 12th day of February , 1975 .

Joan W. Clapperton
Notary Public

JOAN W. CLAPPERTON
NOTARY PUBLIC
DEL. CO., STATE OF NEW YORK
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